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No. 82-1367

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ROADWAY EXPRESS, INC.,
Petitioner,

v.

LAWRENCE G. WARREN,
Respondent.

ON WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF GEORGIA

SUPPLEMENTAL BRIEF OF PETITIONER

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QUESTIONS PRESENTED

Pursuant to request of the Court, Petitioner is filing this supplemental brief on the following questions:

1. Did the original compensation agreement between Petitioner and Respondent receive judicial approval in accordance with Tenn. Code Ann. (Bobbs-Merrill) §50-1006 (1977) [now codified at Tenn. Code Ann. §50-6-206 (1983)]?

2. Has Petitioner secured any final judgment against Respondent from any Tennesee court?

3. Is the mere acceptance of compensation pursuant to an unapproved agreement filed with the Tennessee Department of Labor sufficient to render the agreement binding on the parties in Tennessee for purposes of application of the Full Faith and Credit Clause?

DESIGNATION OF CORPORATE RELATIONSHIPS

Roadway Express, Inc., filing this supplemental brief on writ of certiorari to the Court of Appeals of Georgia, as Petitioner in this proceeding, states that:

This is its fourth designation of corporate relationships. The designation that was filed originally on February 14, 1983 is currently accurate.

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SUPPLEMENTAL BRIEF OF PETITIONER

SUMMARY OF ARGUMENT

The original compensation agreement between Petitioner and Respondent has not received judicial approval under the Tennessee statute providing that settlements be approved by the court. Additionally, Petitioner has not secured any final judgment against Respondent in Tennessee. However, Respondent's irrevocable election to receive benefits under Tennessee law is binding for purposes of application of the Full Faith and Credit and Due Process Clauses of the United States Constitution.

Prior to the date of Respondent's accident, Tennessee law changed from payment pursuant to judicially approved agreements to a direct payment system. The Tennessee statute providing for direct payments makes the fact of payments by the employer and acceptance of such payments by the employee binding upon the parties. This gives Respondent's election to receive benefits under Tennessee law the same finality as it would have under a judicially approved agreement.

The standards for determining the binding effect of an election set forth in Tennessee case law show that Respondent did make an irrevocable election to proceed solely under that State's law. Respondent took affirmative action to recover compensation benefits under the law of the State of Tennessee. He received such benefits for almost one year. He admitted knowledge that the form he signed was a Tennessee form for workers' compensation benefits, that he read the form and that no one tricked him into signing it.

The Tennessee proceedings have been treated by the parties and found in the Georgia award to be final and *res judicata* of the rights of the parties under Tennessee law. Respondent has never filed any cross-appeal from the finding of the Georgia administrative law judge that he had agreed and elected to come under the workers' compensation laws of Tennessee. Respondent has never contended that he did not take affirmative action to seek a recovery under Tennessee law or that he did not make a knowing election to accept benefits under Tennessee law.

Moreover, the supplemental award of benefits to Respondent under Georgia law violates the Due Process Clause of the United States Constitution and the Full Faith and Credit Clause as applied to the Tennessee

statute. For constitutional purposes the contract of employment under which Respondent was working when his accident occurred was a Tennessee contract and not a Georgia contract. There is no significant contact with Georgia in this case. Accordingly, Georgia's exercise of jurisdiction over this workers' compensation claim violates the Due Process Clause of the United States Constitution.

Regardless of the lack of any judicial approval of the agreement between Petitioner and Respondent or any judgment from any Tennessee court, Georgia failed to give full faith and credit to the Tennessee exclusive remedy statute as interpreted by the Tennessee courts. Because Georgia lacks any significant interest in this proceeding, it should be required to give full faith and credit to Tennessee law and its doctrine of irrevocable election.

ARGUMENT AND CITATION OF AUTHORITY

I.

RESPONDENT'S ACCEPTANCE OF BENEFITS PURSUANT TO THE UNAPPROVED AGREEMENT FILED WITH THE TENNESSEE DEPARTMENT OF LABOR WAS SUFFICIENT UNDER THE FACTS AND CIRCUMSTANCES OF THE INSTANT CASE TO RENDER IT BINDING ON THE PARTIES UNDER THE FULL FAITH AND CREDIT AND DUE PROCESS CLAUSES OF THE UNITED STATES CONSTITUTION

The original compensation agreement between Petitioner and Respondent as contained in the record has not received judicial approval under Tenn. Code Ann. (Bobbs-Merrill) §50-1006 (1977) [now codified at Tenn. Code Ann. §50-6-206 (1983)]. (J-A-27-29). Additionally, Petitioner has not secured any final judgment against Respondent from any Tennessee court. However, under

relevant provisions of Tennessee law in effect on the date of Respondent's accident, it was not necessary for any judicial approval of the agreement or judgment to be obtained in order to render Respondent's irrevocable election to receive benefits under Tennessee law binding for purposes of application of the Full Faith and Credit and Due Process Clauses of the United States Constitution (U.S. Const. art. IV, §1; U.S. Const. amend. XIV, §1).

Effective July 1, 1978, prior to Respondent's accident, the procedure for payment of compensation under Tennessee law was changed to a direct payment system with the amending of Tenn. Code Ann. (Bobbs-Merrill) §50-1005 (1977) [now codified at Tenn. Code Ann. §50-6-205 (1983)], which provides in pertinent part as follows:

> (c) Upon making the first payment of benefits, and upon stopping or changing such benefits for any cause other than final settlement, or upon denying a claim after proper investigation, the employer's insurance carrier or the employer, if self-insured, shall immediately notify the director, on a form prescribed by him, that the payment of income benefits has begun or has been stopped or changed. Failure to file such notice shall be a misdemeanor and shall upon conviction be punishable by a fine of not more than fifty dollars ($50.00).
>
> (d) If payments have been made without an award, and the employer subsequently elects to controvert his liability, notice of controversy shall be filed with the director within fifteen (15) days of the due date of the first omitted payment. Failure to file such notice shall be a misdemeanor and shall upon conviction be punishable by a fine of not more than fifty dollars ($50.00). In such cases the prior payment of compensation shall not be considered a binding determination

> of the obligations of the employer as to future compensation payments. Likewise, the acceptance of compensation by the employee shall not be considered a binding determination of the obligations of the employer as to future compensation payments; nor shall the acceptance of compensation by the employee be considered a binding determination of his rights.

The policies behind the change in Tennessee law from payment pursuant to a judicially approved agreement to direct payment are quite evident. The direct payment system facilitates prompt payment of benefits to injured workers by simplifying the payment procedure. There is no unnecessary judicial or administrative intervention in the payment process as long as the parties agree that the employee has sustained an accident compensable under the workers' compensation laws. With the absence of judicial intervention, the statute makes it clear that the fact of payment and receipt is accorded the same finality as if there had been judicial approval of an agreement for the payment of compensation. The statute provides that the fact of prior payment of compensation by the employer and acceptance of compensation by the employee shall not be considered a binding determination of the obligations of the employer as to *future* compensation payments. The statute does not state that the fact of payment by the employer and acceptance of compensation by the employee has no effect on the *prior* payments of compensation. It is clearly implied in the statute that the fact of prior payment and the acceptance of compensation by the employee does constitute a binding determination as to the prior compensation payments. Accordingly, in the instant case, Respondent's election to receive benefits under Tennessee law has the same finality as it would have under a judicially approved agreement.

The Tennessee Supreme Court considered the standards for determining whether an employee made a binding election to receive workers' compensation benefits under one state's law, irrespective of any final judgment or award, in the case of *Thomas v. Transport Insurance Company,* 532 S.W.2d 263 (Tenn. 1976). In that case the employee had an accident at the employer's place of business in Memphis, Tennessee. He had been paid benefits under Arkansas law, apparently without any award or approved agreement, and the employer and insurer were contending that he was precluded from seeking benefits under Tennessee law under the holding of *Tidwell v. Chattanooga Boiler & Tank Co.,* 163 Tenn. 420, 43 S. W.2d 221 (1931). In considering the propriety of the trial court's grant of summary judgment in favor of the employer and insurer, the Tennessee Supreme Court set forth the considerations for nessee Supreme Court set forth the considerations for determining whether or not an employee has made a binding election to accept benefits under one state's law as follows:

> [I]f the employee has taken any affirmative action to seek a recovery under the law of that state, or has voluntarily, deliberately and with full knowledge of his options, accepted benefits under Arkansas law, he may well be precluded by this election and may not be entitled to proceed in Tennessee. *See Tidwell v. Chattanooga Boiler & Tank Company,* 163 Tenn. 420, 423 S.W.2d 221 (1931). On the other hand, if the employee, while seriously injured and disabled, was simply sent checks by a workmen's compensation carrier, with no information as to the nature of the benefits being received, he may not be so precluded. . . Certainly the fact that the employee did receive benefits without question for over one year before taking any legal action is a circumstance against him. . . .

532 S.W.2d at 267. In accord is the decision of the Tennessee Court of Appeals in *Hale v. Commercial Union Assurance Companies,* 637 S.W.2d 865 (Tenn. 1982).

It is clear that under the facts and circumstances of the instant case Respondent did make a binding election to receive workers' compensation benefits under Tennessee law in light of the criteria set forth in *Thomas v. Transport Insurance Company,* 532 S.W.2d 263 (Tenn. 1976). Unlike the employees in *Thomas* and *Hale,* Respondent returned to Tennessee after his accident in Indiana and went to Petitioner's terminal and signed an agreement for payment of compensation under the workers' compensation law of the State of Tennessee. (J-A-8-10, 18, 27-28; R-116) He admitted knowledge that the form was a Tennessee form for workers' compensation benefits, that he read the form and that no one tricked him into signing it. (J-A-18) It was stipulated by the parties that the workers' compensation benefits paid were paid under the Workmen's Compensation Act of Tennessee. In connection with this stipulation, Respondent's counsel stated: "We have an executed form and it is correct." (J-A-9) Respondent's counsel was hired before the time that he and Petitioner had a dispute over his Tennessee claim, and Respondent and his counsel had discussed his workers' compensation claim before Petitioner terminated his benefits in Tennessee. (J-A-17, 20) Moreover, Respondent accepted benefits under Tennessee law for almost one year before filing any claim in Georgia. (J-A-3-4, 30-47)

Accordingly, there is no question but that Respondent made a binding election to accept benefits under Tennessee law. He took affirmative action to receive these benefits by entering into the agreement for receipt of compensation under the law of the State of Tennessee. He was

paid compensation under Tennessee law from October 21, 1978 through October 12, 1979. To allow Respondent, after making this binding election, to seek a second award of benefits under Georgia law will only encourage the forum-shopping which the Full Faith and Credit Clause was designed to prevent. Respondent was content to receive benefits under Tennessee law as long as Petitioner was paying them. It was only after Petitioner contended Respondent was no longer disabled, one year after benefits had been commenced, that Respondent sought refuge in the Georgia forum. Respondent obviously cannot contend that neither he nor his counsel was aware of the facts and circumstances showing his election of the Tennessee forum to adjudicate his workers' compensation claim. Respondent has a remedy. He is free to contend in the Tennessee court system that he is still disabled and seek recommencement of benefits under Tennessee law. Instead of pursuing this readily available remedy, Respondent decided to forum-shop and filed another claim in Georgia. His binding election to receive benefits under Tennessee law precludes this. Respondent's election to receive benefits, coupled with the certified copies of the Tennessee proceedings which are part of the record, are "public records" of the State of Tennessee entitled to full faith and credit in Georgia.[1]

[1]U.S. Const. art. IV, §1 provides: "Full faith and credit shall be given in each state to the public acts, *records*, and judicial proceedings of every other state. . . ." (emphasis added)

Moreover, the Tennessee proceedings have been treated by the parties and found in the Georgia award to be final and *res judicata* of the rights of the parties under Tennessee law. Therefore, the fact that the original compensation agreement did not receive judicial approval and that Petitioner has not secured any final judgment against Respondent from any Tennessee court is irrelevant.

The Georgia administrative law judge found as a matter of fact that Petitioner and Respondent had agreed and elected to come under the workers' compensation laws of Tennessee and that benefits had been paid to Respondent under Tennessee law from October 21, 1978 through October 12, 1979. This finding was adopted by the Full Board of Workers' Compensation of Georgia. Petitioner has appealed this award through the entire Georgia court system, but Respondent has never filed any cross-appeal from this finding. Moreover, Respondent has never contended that he did not take affirmative action to seek a recovery under Tennessee law or that he did not make a knowing election to accept benefits under Tennessee law. In the absence of any cross-appeal from this ruling adverse to Respondent, it is clear that the Tennessee proceedings and Respondent's election to proceed solely under Tennessee law in his workers' compensation law are *res judicata* and final under Georgia law. Ga. Code Ann. (Harrison) §6-803 (1975) [now codified at Official Code of Ga. Ann. § 5-6-38 (1982)]; *Linder v. Alterman Foods, Inc.*, 162 Ga. App. 786, 292 S.E.2d 900 (1982); *Miller & Company v. Gibbs*, 161 Ga. 698, 132 S.E. 626 (1926). That Respondent has made a binding election to receive benefits under Tennessee law has also been recognized by the Federal District Court for the Northern District of Indiana in the case of *Roadway Express, Inc. v. Lawrence G. Warren*, No. H 79-490 (N.D.Ind. Feb. 9, 1983), printed

in the Supplemental Brief in Support of Petition for Certiorari at pp. 1a-11a.

Additionally, these facts show that the supplemental award of benefits to Respondent under Georgia law was unconstitutional under (1) the Due Process Clause of the United States Constitution and (2) under the Full Faith and Credit Clause as applied to the Tennessee *statute.*

Respondent has contended that the contract under which he was working when injured in Indiana was still the original contract entered into in Georgia in 1963. While the Georgia Court of Appeals did affirm the Board's finding of a Georgia employment contract, this finding only applies to the issue of whether or not Respondent was working under a Georgia contract for purposes of application of the Georgia Workers' Compensation Act. Ga. Code Ann. (Harrison) §114-411 (1973) [now codified at Official Code of Ga. Ann. §34-9-261 (1982)]. The Georgia Court of Appeals never addressed the issue of whether it was a Georgia contract or a Tennessee contract for constitutional purposes of application of the Due Process and Full Faith and Credit Clauses.

This Court was recently presented with a case which exemplifies the impropriety of allowing Georgia to make a supplemental award of benefits under the Due Process Clause. In the case of *McCluney v. Jos. Schlitz Brewing Company,* 454 U.S. 1071, 102 S.Ct. 624 (1981), the Court affirmed without opinion the judgment of the Eighth Circuit Court of Appeals, reported at 649 F.2d 578 (8th Cir. 1981). The facts in *McCluney* are analogous to the instant case. In 1955 McCluney was a vice president for a brewing company in Kansas City, Missouri. Schlitz acquired the company in 1956 and hired McCluney as the industrial re-

lations manager for its Kansas City plant. He was subsequently promoted to plant manager. In 1970 Schlitz offered him the position of plant manager at its Winston-Salem, North Carolina plant. McCluney accepted this position and moved to North Carolina where he worked for Schlitz for nearly five years. In 1975 McCluney accepted another promotion to vice president of plant operations at corporate headquarters in Milwaukee, Wisconsin. He then sought the transfer of his secretary from Winston-Salem to Milwaukee. The company refused to transfer her for management policy reasons. McCluney and the executive vice president of Schlitz had a confrontation over this which resulted in his resignation being demanded. After McCluney left the employ of Schlitz he requested a service letter from Schlitz under a Missouri service letter statute. Schlitz denied him the service letter and McCluney moved to Missouri and brought suit in a Missouri state court, alleging among other matters that Schlitz violated the Missouri service letter statute. After removal to federal court, the jury at trial found that Schlitz had violated the Missouri service letter statute. The Eighth Circuit Court of Appeals reversed, holding that there were not sufficient contacts for the application of Missouri law. The court held that the contract under which McCluney was working when his employment with Schlitz was terminated was the contract for his promotion to vice president of plant operations in Milwaukee, Wisconsin. The only contact he had with Missouri relevant in point of time to the matter at suit was his post-termination change of residence. The Eighth Circuit specifically rejected McCluney's argument that his employment contract originally entered into in Missouri in 1956 made his rights fixed and immutable. The court held that with each job change to another location his previous employment contract was discharged for due

process purposes. The simple fact that he was originally hired in Missouri was not controlling.

The *McCluney* decision adequately demonstrates that Respondent was not working under a Georgia employment contract when injured in Indiana in 1978. The only contact Georgia has with this litigation is the fact that the earlier employment contract between Petitioner and Respondent was entered into in the State of Georgia in 1963. This contact is removed by the fact that, for constitutional purposes, Respondent was working for Petitioner under a different employment contract when injured in 1978. All of the other contacts in this case are outside of Georgia. At the time of the accident Respondent was a resident of Tennessee. From the date of his reemployment with Petitioner in 1971, Respondent worked out of the Nashville, Tennessee terminal and had not even driven to Georgia for over six years prior to the accident. The accident occurred in Indiana while Respondent was on his run from Nashville to Chicago, a run he had exclusively driven for over two years prior to the accident. He has not moved to Georgia since the accident or been transferred back to Georgia. He now lives in Florida. The lack of any significant contact with Georgia in this case shows that Georgia's exercise of jurisdiction over Respondent's workers' compensation claim violates the Due Process Clause of the United States Constitution. *Allstate Insurance Company v. Hague,* 449 U.S. 302, 101 S.Ct. 633 (1981); *Home Insurance Company v. Dick,* 281 U.S. 397, 50 S.Ct. 338 (1930); *John Hancock Mutual Life Insurance Company v. Yates,* 299 U.S. 178, 57 S.Ct. 129 (1936).

Finally, the lack of any judicial approval of the agreement between Petitioner and Respondent or any judgment from any Tennessee court does not alter the fact that

Georgia failed to give full faith and credit to the Tennessee statute. The Tennessee exclusive remedy statute, as interpreted by the Tennessee courts in *Tidwell v. Chattanooga Boiler & Tank Co.*, 163 Tenn. 420, 43 S.W.2d 221 (1931) and *True v. Amerail Corporation*, 584 S.W.2d 794 (Tenn. 1979), provides that when a worker takes action to elect benefits under the law of one state he cannot thereafter maintain a second action for recovery of benefits in another state. The lack of any significant interest of the State of Georgia in this proceeding shows that Georgia should be required to give full faith and credit to Tennessee law and its doctrine of irrevocable election. *See Bradford Electric Light Company v. Clapper*, 286 U.S. 145, 52 S.Ct. 571 (1932) and the discussion of full faith and credit to the Tennessee statute set forth in the Brief of Petitioner at pp. 28-36.

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that the lack of judicial approval of the compensation agreement between Petitioner and Respondent and the lack of any final Tennessee judgment does not affect the fact that Respondent's election to proceed under Tennessee law in his workers' compensation claim is final and binding on the parties for purposes of application of the Full Faith and Credit and Due Process Clauses of the United States Constitution. The decision of the Georgia Court of Appeals should be reversed, because Georgia cannot constitutionally exercise jurisdiction over this workers' compensation claim in contravention of the "irrevocable election doctrine" of Tennessee law.

Respectfully submitted,

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